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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 116

WILLIAM MALLOY

Petitioner,

—versus—

PATRICK J. HOGAN,
Sheriff of Hartford County,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

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WILLIAM MALLOY *Petitioner,* *v.* PATRICK J. HOGAN, Sheriff of Hartford County, *Respondent.*	No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

William Malloy, the petitioner herein, respectfully prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Errors of the State of Connecticut entered on the 22nd day of January, 1963, affirming the judgment of the Superior Court for Hartford County at Hartford holding the petitioner in contempt of court for failing to answer questions asked of him in an investigation in the probable commission of crimes in Hartford County.

OPINION BELOW

The opinion of the Supreme Court of Errors is reported in Vol. _____ Conn. _____, and in Conn. Law Journal, Vol XXIV No. 12, pg. 3, issue of January 22, 1963, and it appears in Appendix B, infra, pg. B-1.

JURISDICTION

The judgment of the Supreme Court of Errors was entered on January 22, 1963. The jurisdiction of this Court is invoked under 28 U.S. Code, Sec. 1257 (3). The constitutional question was originally raised in the trial court and assigned as error to the said Supreme Court of Errors, which ruled thereon. (Appendix B).

QUESTION PRESENTED

May the petitioner, who had been convicted in Hartford, Connecticut, of a state crime in 1959 and who, in 1961, refused to answer incriminatory questions put to him by a Board duly constituted to investigate the probable commission of crimes in Hartford County, be denied the constitutional right not to testify against himself, under the Fifth Amendment as supplemented by the Fourteenth Amendment, by a ruling of the highest court of that State that the Fifth Amendment does not apply to state proceedings and by an insistence upon applying its state standards, rather than the more liberal federal standards, in determining whether or not the questions asked of the petitioner were sufficiently innocous as to make them harmless and, thus, properly answerable.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fifth Amendment.

STATUTORY PROVISIONS INVOLVED

The statutes involved are Sections 1-1, 51-35, 52-199, 53-295, 54-47, 54-193 and 54-197 of the General Statutes of Connecticut, Revision of 1958, (Appendix A).

STATEMENT OF THE CASE

On September 11, 1959, as the result of a general raid that was conducted in the Hartford area by the State and Hartford police departments, the petititioner, along with others, was arrested in an apartment at 600 Asylum Street, Hartford.

He was found guilty of poolselling, fined five hundred dollars, and he was given a one-year sentence in the County jail. The sentence was ordered to be suspended after 90 days, at which time he was to be placed on probation for two years.

Thereafter, on January 16 and 25, 1961, the petitioner appeared before the Hon. Ernest A. Inglis, who was conducting an investigation to determine whether there was probable cause to believe that crimes were being committed in Hartford County.

On both days, the petitioner answered several questions, but he refused to answer the following questions that were posed by the State's Attorney: (1) For whom did he work on September 11, 1959; (2) Who selected and paid his counsel in connection with his arrest on September 11, 1959, and his subsequent appearances in court due to said arrest; (3) Who selected and paid his bondsman; (4) Who paid his fine; (5) The name of

the tenant of the apartment in which he was apprehended; and (6) Did he know one John Bergoti.

His refusal was based upon his rights under the Fifth Amendment, believing that to answer the foregoing questions would incriminate him.

In due course, he was found guilty of contempt. He appealed to the Supreme Court of Errors from the judgment of the lower court dismissing an application for a writ of habeas corpus to release him from jail, to which he had been committed because of his refusal to answer the aforesaid questions.

The petitioner assigned as error the conclusions of the lower court, essentially to the effect that (1) having been convicted of the crime of poolselling in 1959, he cannot be charged again with that crime or a conspiracy to commit that crime (overlooking that conspiracy is a separate offense that is independent of the unlawful act which is its purpose. *State v. Phaillice*, 134 Conn. 181, 185); (2) the questions that were propounded to the petitioner were so remote and so harmless that there was no reasonable ground to fear any prosecution by answering them (overlooking that the petitioner is in the best position to know whether or not it was dangerous to answer the questions and that, having been involved in one area of crime, he could also have been involved — previous to the inquiry or at the time thereof — in other areas of criminal activity that would come to light if he answered, especially as he could surmise, with a fair degree of accuracy, that an experienced State's Attorney would not ask frivolous or harmless questions of him); and (3) that the compulsory answering of the questions would not violate the petitioner's rights under the Fifth Amendment, nor

his equivalent rights under Article 1, Sec. 9, of the Constitution of the State of Connecticut.

The Supreme Court of Errors upheld all the conclusions of the lower court. In its decision, the Court correctly indicated that the petitioner was properly brought before the Hon. Ernest A. Inglis, who was inquiring into crime in Hartford County in 1961 under the provisions of Sec. 54-47 of the General Statutes of the State of Connecticut, Revision of 1958; that his conviction in 1959 was for the crime of poolselling, Sec. 53-295 of said General Statutes; and that this offense was a misdemeanor. Sec. 1-1 of said General Statutes.

As at least a partial basis for its decision, it also concluded that the statute of limitations relating to misdemeanors, which becomes operative after 1 year, Sec. 54-193 of the said General Statutes, would effectively bar any possible prosecution that could result from any admission or testimony that he might have given. This is in error as the petitioner could have been involved, very reasonably and easily, in the commission of a felony, which has a five year statute of limitations, Sec. 54-193, supra, or a conspiracy to commit a felony, for which the statute of limitations runs up to fifteen years. Sec. 54-197 of the said General Statutes. In this contingency, he would be exposed to prosecution.

REASONS FOR GRANTING WRIT

The application of the Bill of Rights to federal proceedings is fully recognized. It is enforceable. But its application to state proceedings has been, and still continues to be, a source of conflict and difficulty. The

resolution of this conflict in respect to state proceedings, particularly in connection with the clause of the Fifth Amendment protecting a person from acting as a witness against himself, is sought by this Writ.

Historically, the Federal courts have held, starting with the decision of *Barron v. Baltimore*, 7 Peters 243, 8 L. ed. 672, that the Bill of Rights did not apply to State matters. After the adoption of the Fourteenth Amendment and particularly since 1925, there has been a steady turn from this view. As a result, this Court has ruled (a) that the First Amendment must be observed by the States (*Gitlow v. New York*, 268 U.S. 652, 666; *Cantwell v. Connecticut*, 310 U.S. 296, 303; *West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 633; *DeJonge v. Oregon*, 299 U.S. 353, 364; *Bridges v. California*, 314 U.S. 252, 277; *Palko v. Connecticut*, 302 U.S. 327); (b) that the requirement of the Fifth Amendment that just compensation shall be paid for private property taken for public use must be observed by the States (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 241); (c) that the requirement of the Sixth Amendment that an accused shall have the assistance of counsel for his defense must be observed by the States (*Powell v. Alabama*, 287 U.S. 45, 68-69); and (d) that the requirement of the Fourth Amendment against unreasonable searches and seizures must be observed by the States. *Mapp v. Ohio*, 367 U.S. 643, 6 L. ed. (2nd) 1081, 1085, 1086.

It is also historically correct to note that the Supreme Court of Errors of the State of Connecticut has been quite reluctant to permit the application of the Bill of Rights, especially the Fourth and Fifth Amendments, to state proceedings. *State v. Griswold*, 67 Conn. 290; *State v. Gaetano*, 96 Conn. 306, 350;

State v. Magnano, 97 Conn. 543, 546; *McCarthy v. Clancy*, 110 Conn. 482, 500; *Pickett v. Marcucci*, 112 Conn. 169, 173; *State v. Carol*, 120 Conn. 573, 575. However, by virtue of *Mapp v. Ohio*, supra, it is now in agreement that the Fourth Amendment is applicable, (*State v. DelVecchio*, 149 Conn. 567), but it still clings tenaciously to the view that the requirement of the Fifth Amendment against self-incrimination applies to the Federal courts only.

This Court, having recently declared in *Mapp v. Ohio*, supra, that the provision against unreasonable searches and seizures in the Fourth Amendment must apply to state proceedings, should also declare that the provision against self-incrimination in the Fifth Amendment should apply with equal force to the States, as both of these provisions are so analogous and similar in purpose and scope that there is no valid reason for delaying further such a pronouncement. To do so would be in keeping with *Boyd v. U.S.*, 116 U.S. 616, 630, in which it was urged that the constitutional provision for the security of a person should be liberally construed and that it is the duty of the Courts to be watchful against any stealthy encroachments upon these rights. So also, in *Weeks v. U.S.*, 232 U.S. 383, 393, it was said that "the efforts of the courts and their officials to bring the guilty to punishment, praisworthy as they are, are not to be aided by the sacrifice of these great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

It is true that in *Adamson v. California*, 322 U.S. 46, 91 L. ed. 1903, it was held that the clause of the Fifth Amendment protecting a person from being a witness against himself was not made effective to state

proceedings by the Fourteenth Amendment. This was a 5 to 4 decision and it was modified in the later case of *Rochin v. California*, 342 U.S. 165, albeit on the basis that the Due Process Clause becomes effective upon the States where the method of obtaining the incriminating evidence offended "a sense of justice," rather than on the specific premise of the Fifth Amendment. Thereafter, in the case of *Irvine v. California*, 347 U.S. 128, 98 L. ed. 561, it was held in another 5 to 4 decision that a State court conviction, even though based upon illegally obtained evidence, will stand pursuant to *Wolf v. Colorado*, 338 U.S. 25, 27, 93 L. ed. 1782, 1785. The majority distinguished this case from *Rochin v. California*, supra, by the absence of any physical assault upon the person as occurred in that case and which made it so repugnent to the concept of ordered justice or fundamental law. Of the five justices concurring in the judgment, one did so reluctantly and solely upon the basis of *Wolf v. Colorado*, supra, which has since been over-ruled by *Mapp v. Ohio*, supra.

Another difference between the Federal courts and the Supreme Court of Errors of the State of Connecticut is the standards that each applies in determining whether or not questions asked of a witness are so innocuous and harmless that he must answer them regardless of how adversely, in his opinion, he may be harmed. The Connecticut courts hold that it will disallow the question only if it concludes that the witness has a reasonable ground to apprehend danger of criminal liability from any compulsion to answer. *McCarthy v. Clancy*, 110 Conn. 482, 488. And this view is repeated in the instant case.

The Federal courts, with and since *Hoffman v. U.S.*, 341 U.S. 479, 486, have adopted a more liberal view, holding, in effect, that the privilege against testifying should be sustained on the mere possibility of the answers being dangerous to the witness. In that case, Hoffman appeared before a Grand Jury and was asked the following:

Q What do you do now, Mr. Hoffman?

A I refuse to answer.

Q Have you been in the same undertaking since the first of the year?

A I don't understand the question.

Q Have you been doing the same thing you are doing now since the first of the year?

A I refuse to answer.

Q Do you know Mr. William Weisberg?

A I do.

Q How long have you know him?

A Practically twenty years, I guess.

Q When did you last see him?

A I refuse to answer.

Q Have you seen him this week?

A I refuse to answer.

Q Do you know that a subpoena has been issued for Mr. Weisberg?

A I heard about it in Court.

Q Have you talked with him on the telephone this week?

A I refuse to answer.

Q Do you know where Mr. Weisberg is now?

A I refuse to answer.

This Court held that he was privileged not to answer any of foregoing questions.

The following cases, among others, upheld the Hoffman case: *Aiuppa v. U.S.*, 201 F.2nd 287, wherein the witness was asked if he knew two particular persons and if he received a wire service from a particular source; *In re Neff*, 206 F.2nd 149, wherein the witness was asked if he knew certain people, if he had ever been a member of the Communist party and if he had discussed the Communist party with a Mr. Valentino; and *U.S. v. Courtney*, 236 F.2nd 921, wherein the witness was asked a series of questions designed to elicit information with respect to whom, in the course of or as an incident of his business, he paid money.

In ignoring, as it did, the Federal standard that the possibility that an answer might incriminate a witness gives him the privilege of refusing to answer, and applying the State standard that a witness must have a reasonable belief that his answer will incriminate him in order to acquire this privilege, the Supreme Court of Errors stripped this constitutional guaranty under the Fifth Amendment from the petitioner.

The tide of decisions trending towards a forthright ruling that the self-incriminatory prohibition in the Fifth Amendment should apply to State courts has achieved sufficient flood stage proportions to warrant the taking of a stand at this time. The failure to do so, especially after *Chicago, B. & Q. R. Co. v. Chicago*, supra, applying to the States another clause in the Fifth Amendment relative to the taking of private property without just compensation, and the decision in *Mapp v. Ohio*, supra, placing upon the States the obligation to observe the provisions of the Fourth Amendment against unreasonable searches and seizures, which, essentially, equates with the clause against self-incrimination in the Fifth Amendment, would be to make a mockery of our conception of logic and justice.

CONCLUSION

In conclusion, upon the facts and law, it is respectfully urged that this Court grant this Petition for the reason that the petitioner herein will be deprived of his constitutional right not to act as a witness against himself as permitted by the Fifth Amendment, as supplemented by the Fourteenth Amendment, to the Constitution of the United States of America.

Respectfully submitted

HAROLD STRAUCH

Counsel for the Petitioner

APPENDIX A

1. Sec. 1-1. Words and Phrases. In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly.

* * * * * *

Any crime punishable by death or imprisonment for more than one year shall be deemed a felony, and any other crime, unless designated a felony by statute, shall be deemed a misdemeanor.

* * * * * *

2. Sec. 51-35. Witness Refusing to Testify; Imprisonment. Self-incrimination. Any court may commit to jail any person legally summoned who refuses to appear and testify before it in any case, there to remain at his own expense until he so testifies; but no person shall be compelled to give evidence against himself, except as otherwise provided by statute, nor shall such evidence when given by him be used against him.

3. Sec. 52-199. Questions which need not be answered. Self-incrimination. In the conduct of any hearing or trial, a party interrogated shall not be obliged to answer a question or produce a document the answering or producing of which would tend to incriminate him or to disclose his title to any property the title whereof is not material to the hearing or trial in the course of which he is interrogated, and the right to refuse to answer a question, produce a document or disclose a title may be claimed either by the party interrogated or by counsel in his behalf.

4. Sec. 53-295. Pool Selling. Any person, whether as principal, agent or servant, who owns, possesses, keeps, manages, maintains or occupies, or assists in keeping, managing, maintaining or occupying, any building, room, office, park, ground, enclosure or place with apparatus, books or boards or any device for the purpose of making, recording or registering bets or wagers, or of buying or selling pools upon the result of any trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of any game, competition, political nomination, appointment or election, whether such trial, contest, game, competition, nomination, appointment or election takes place either within or without this state, or where pool selling of any kind, either directly or indirectly, is permitted or carried on, or in which the business of transmitting money to any race track or other place there to be placed or bet on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, is permitted or carried on in any manner, and any person who keeps a place which is reputed to be a place resorted to for the purpose of selling pools upon the result of any election, and any person who makes, records or registers any such wagers or bets, or buys or sells, or is concerned in buying or selling, any such pools, or in carrying on the business of the transmission of money to any race track or other place there to be bet or placed on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, and any person who, being the owner, lessee or occupant of any building, room, park, ground, enclosure or place, or part thereof, knowingly permits the same to be used or occupied for any such purpose, shall be fined not more than five hundred dollars or be imprisoned not more than one year or be

both fined and imprisoned; and each day of such owning, keeping, occupying, permitting or transmitting shall constitute a separate offense. Any person who becomes the custodian or depositary of any pools, money, property or thing of value, in any manner wagered or bet upon such result, or of any apparatus of any kind used for the purpose of assisting in buying or selling any such pools or making any such wagers or bets, shall be punished in like manner. The provisions of this section shall not prohibit the giving of purses or premiums for any trial or contest of skill, speed or endurance of man, beast, bird or machine and the charging of an admission or entrance fee to any contestant in any such trial or contest.

5. Sec. 54-47. Investigations Into Commission of Crime. Whenever it appears to the superior court for any county that the administration of justice requires an investigation to determine whether or not there is probable cause to believe that a crime or crimes have been committed within the county, said court may order an inquiry to be made into the matter, to be conducted before any judge of said court or a state referee designated by it. Such inquiry shall be conducted in public or private as said court orders. The attendance of witnesses and the production of documents at such inquiry may be compelled by subpoena, signed by any official authorized to issue such process. If any witness properly summoned fails to appear or to produce any documents included in such subpoena, or if he fails to answer any proper question, the judge or referee conducting such inquiry may report the matter to the state's attorney for the county wherein the investigation is being conducted and such state's attorney may

file a complaint setting forth the facts at any criminal session of the superior court in such county. The court shall thereupon issue a citation to such witness to appear before said court and show cause why he should not be punished as for a contempt, and if, after hearing, the court finds that he failed to appear without due cause or failed to produce any document properly to be presented to the judge or state referee conducting the investigation or failed to answer any proper question in the course of such investigation, it may punish him as it might a witness failing to appear, to produce a document properly to be considered or to answer a proper question before the court. Witnesses may be examined by the judge or state referee conducting the inquiry or by the state's attorney or by any other attorney or attorneys appointed by the court for such purpose. The official stenographer of said court or his assistant shall record any testimony so taken. At the conclusion of such inquiry the judge or referee conducting the same shall file with the court a report and the court shall direct whether, and to what extent, such report shall be made available to the public or interested parties. Any transcript of testimony taken at such inquiry shall likewise be filed with the court and it shall have the same powers with reference to it as it has with reference to the report; provided any person accused of crime as a result of such inquiry shall have access at all reasonable times to the transcript of his own testimony given by him in such inquiry.

6. Sec. 54-193. Limitation of Prosecutions for Various Offenses. No person shall be prosecuted for treason against this state, or for any crime or misdemeanor of which the punishment is or may be imprisonment in the State Prison, except within five years next after the

offense has been committed; nor shall any person be prosecuted for the violation of any penal law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment in the State Prison, but within one year next after the offense has been committed; but, if the person, against whom an indictment, information or complaint for any of said offenses is brought, has fled from and resided out of this state, during the period so limited, it may be brought against him at any time, within such period, during which he resides in this state, after the commission of the offense; and, when any suit, indictment, information or complaint for any crime may be brought within any other time than is limited by this section, it shall be brought within such time.

7. Sec. 54-197. Conspiracy. Any person who combines, confederates or agrees with another or others to accomplish any unlawful object by lawful means, or any lawful object by unlawful means, or any unlawful object by unlawful means, if one or more of such persons do any act in furtherance of such combine, confederation or agreement, shall be fined not more than five thousand dollars or imprisoned not more than fifteen years or both, provided, if the crime which is the object of such combination, confederation or agreement is a misdemeanor, such person shall be subject to the same penalty as is provided by statute for the commission of the misdemeanor. No officer or member of any lawful organization shall be held liable for the unlawful acts of individual officers, members or agents of such organization except upon proof of participation in or authorization of such acts or of the ratification thereof.

APPENDIX B

WILLIAM MALLOY *v.* PATRICK J. Hogan, *Sheriff*

SUPREME COURT OF ERRORS

DECEMBER TERM, 1962

Judgment January 3, 1963

Announced January 22, 1963

Habeas corpus alleging unlawful imprisonment, brought to the Superior Court in Hartford County and tried to the court, *Covello, J.*; judgment for the defendant and appeal by the plaintiff. *No error.*

Harold Strauch, for the appellant (plaintiff).

Harry W. Hultgren, Jr., with whom, on the brief, were *John D. LaBelle*, state's attorney, and *George D. Stoughton*, assistant state's attorney, for the appellee (defendant).

KING, J. On September 11, 1959, the plaintiff was arrested in a gambling raid at 600 Asylum Street, Harford, and charged, in two counts, with pool selling in violation of § 53-295 of the General Statutes. Subsequently, on November 5, he was allowed to plead nolo contendere to the first count of the information. A finding of guilty on that count was entered, and he was ordered to pay a fine of $500 and was sentenced to one year in jail, execution of the jail sentence to be suspended after ninety days of service and probation to be in effect for two years. What disposition was made of the second count of the information is not disclosed in the printed record, but the judgment file shows that a nolle prosequi was entered as to that count immedi-

ately after the imposition of the sentence under the first count.

At some time prior to January 16, 1961, the Superior Court in Hartford County, pursuant to § 54-47 of the General Statutes, entitled "Investigations into commission of crime," appointed the Honorable Ernest A. Inglis, formerly chief justice of Connecticut and then a state referee, to conduct an inquiry into whether there was reasonable cause to believe that crimes, including gambling, had been committed in Hartford County. Witnesses were subpoenaed to appear before the referee, and on January 16, 1961, Malloy, who had been so subpoenaed, appeared and was asked certain questions by the state's attorney. Most of these Malloy refused to answer on the ground that an answer would tend to incriminate him. Thereupon, the state's attorney indicated that the matter would have to be referred to the Superior Court for contempt proceedings under the authority of § 54-47. The referee inquired of Malloy whether he had had the advice of an attorney and he replied that he had not, since he had just received the subpoena. The referee suggested that Malloy consult an attorney before he was summoned for contempt. Apparently, contempt proceedings were not then instituted, since nine days later, on January 25, 1961, Malloy was recalled as a witness and again questioned. In the meantime, he had had full opportunity to consult counsel. The questions asked him on January 25, which he refused to answer on the same claim of priviiege, were practically identical with those he had been asked on his first appearance before the referee. The questions posed on both occasions are well summarized in Malloy's brief, substantially as follows: (1) For whom did Malloy work on September 11, 1959, the date he

was arrested on the charge on which he was convicted? (2) Who selected and paid his counsel in conection with that charge and his defense thereto? (3) Who selected his bondsman and who paid him? (4) Who paid Malloy's fine? (5) What was the name of the tenant in the apartment in which he was apprehended? (6) Did he know John Bergoti?

On January 26, 1961, pursuant to § 54-47, Malloy was brought before the Superior Court and, after a hearing, was found to have failed to answer proper questions before the referee and was ordered committed to jail until he answered the questions or until the further order of the court. Malloy was thereupon committed to jail. Later in the day he made application for a writ of habeas corpus, directed to the defendant as the keeper of the jail, on the ground that the confinement in jail was illegal because it was based on a denial, in violation of the fifth amendment to the constitution of the United States and of § 9 of article first of the constitution of Connecticut, of Malloy's privilege of refusing to answer questions on the ground of self-incrimination. After a hearing on February 7, 1961, the court found the issues for the defendant and that Malloy was not unlawfully confined, and it dismissed the writ of habeas corpus. From that judgment Malloy took this appeal, his basic claim of error being that his refusal to answer the question was privileged.

The law according the privilege against self-incrimination is not open to question, but there are often difficulties in its application. The privilege is not a general one; it is, at least in all ordinary situations, to be claimed as to each question asked. *United States v. Romero*, 249 F.2d 371, 375 (2d Cir.); *Mc-*

Carthy v. Clancy, 110 Conn. 482, 490, 148 A. 561. It is not a prohibition against inquiry but confers an option of refusal to answer. *State v. Kemp*, 126 Conn. 60, 72, 9 A.2d 63. Our decisions from time antedating the adoption of our constitution in 1818 have consistently recognized and upheld the privilege, and it was, by § 9 of article first, incorporated in our constitution. See, for instance, *Grannis v. Branden*, 5 Day 260, 272 (a malpractice case decided in 1812); *Norfolk v. Gaylord*, 28 Conn. 309, 312 (a civil bastardy action decided over a century ago, in 1859). This section provides that an accused in a criminal prosecution "shall not be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by due course of law." This language is very similar to that of the fifth amendment to the United States constitution, and cases interpreting the scope and application of the fifth amendment in the federal proceedings are not without persuasive force in the interpretation of our own constitutional provision. In *McCarthy v. Clancy*, supra, 488, the privilege against self-incrimination was expressly held applicable to a witness subpoenaed in a statutory investigation similar to that in which Malloy was questioned; and in *State v. Kemp*, supra, the privilege was held applicable to a witness summoned to appear before a grand jury. It is clear that Malloy was clothed with this privilege when he went before the referee, so that the only question is whether his refusal to answer was justified under the rules governing the exercise of the privilege.

On the one hand, the determination whether a question does or does not tend to incriminate a person cannot be left solely to his judgment, since he could then refuse to answer obviously innocuous questions.

On the other hand, if he were required completely to explain the precise basis for his belief that an answer to a given question would tend to incriminate him, he might well lose much, if not all, of the benefit of the privilege, since the state might utilize his explanation to obtain "leads" to evidence for future use against him. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118; *Grannis v. Branden*, supra.

The rule is well stated in *McCarthy v. Clancy*, supra, 488: "[A] witness .. .has the right to refuse to answer any question which would tend to incriminate him. But a mere claim on his part that the evidence will tend to incriminate him is not sufficient. . . . [He having] made his claim, it is then . . . [necessary for the judge] to determine in the exercise of a legal discretion whether, from the circumstances of the case and the nature of the evidence which the witness is called upon to give, there is reasonable ground to apprehend danger of criminal liability from his being compelled to answer. That danger 'must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection

into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.' Cockburn, C. J., in *Regina v. Boyes*, 1 B. & S. 311, 330; see also *Brown v. Walker*, 161 U.S. 591, 599, 16 Sup. Ct. 644 [40 L. Ed. 819]; *Mason v. United States*, 244 U.S. 362, 37 Sup. Ct. 621 [61 L. Ed. 1198]; *State v. Thaden*, 43 Minn. 253, 255, 45 N.W. 447; *State v. Wood*, 99 Vt. 490, . . . [134] Atl. 697; *Manning v. Mercantile Securities Co.*, 242 Ill. 584, 90 N.E. 238; 4 Wigmore on Evidence (2d Ed.) § 2271 [now 8 Wigmore § 2271 (McNaughton Rev. 1961)] Moreover, a witness called before such a tribunal as that authorized by the statute in question, against whom no accusation or proceeding is pending, could not advance such a claim as a justification for a failure to answer any question whatsoever which might be asked; for rarely would it happen that all the evidence he might give in regard to the matter under investigation would tend to incriminate him. . . . [B]efore he would be justified in refusing to answer [a given question], it must appear that there was reasonable ground to apprehend from it some real danger of incrimination. *Eckstein's Petition*, 148 Pa. St. 509, 515, 24 Atl. 63; *Ex parte Stice*, 70 Cal. 51, 53, 11 Pac. 459. The same rules apply with regard to the production of documents. *Manning v. Mercantile Securities Co.*, supra, 592."

It remains to apply these principles to the questions asked Malloy. Only one question, whether Malloy knew John Bergoti, was not directly connected with, and restricted to the date of, Malloy's arrest in 1959 on the pool selling charge. Bergotti is nowhere described or in any way identified, either as to his occupation, actual

or reputed, or as to any criminal record he may have had. Indeed, the same may be said as to Malloy, except for the conviction for pool selling, which antedated his interrogation. Cf. *Hoffman v. United States*, 341 U.S. 479, 487, 71 S. Ct. 814, 95 L. Ed. 1118. Malloy made no attempt even to suggest to the court how an answer to the question whether he knew Bergoti could possibly incriminate him. That an answer might have incriminated Bergoti would be immaterial, since Malloy's privilege, such as it was, existed solely for his own personal protection and not for the protection of any other person. *Rogers v. United States*, 340 U.S. 367, 371, 71 S. Ct. 438, 95 L. Ed. 344. On this state of the record the question was proper, and Malloy's claim of privilege, made without explanation, was correctly overruled. Malloy "chose to keep the door tightly closed and to deny the court the smallest glimpse of the danger he apprehended. He cannot then complain that we see none." *In re Pillo*, 11 N.J. 8, 22, 93 A.2d 176; see also, *Hoffman v. United States*, supra 489 (wherein it was held erroneous to refuse to consider explanations of a witness as to why he felt his answers to questions asked of him might incriminate him).

We turn now to the other questions asked Malloy, all of which were restricted in time and subject matter to the particular crime for which he was convicted in 1959. We need not decide whether, on their face and apart from any consideration of Malloy's immunity from prosecution, the questions should or should not have been answered in the light of his failure to give any hint of explanation as to how answers to them could incriminate him. In any event, as hereinafter pointed out, he was apparently clothed with immunity from any prosecution growing out of answers to the

questions, and he failed in any way to point out any infirmity in that immunity.

The state's attorney pointed out to Malloy that the questions were "about a matter on which you are already convicted and there can be no incrimination in that." Cf. *United States v. Smith*, 4 Day 121, 126. The referee evidently felt that no self-incrimination was involved. This is indicated by his suggestion to Malloy that he consult a lawyer before contempt proceedings were instituted. Of course, Malloy could not again be convicted of the identical crime of pool selling, and if this was the only possible danger of self-incrimination the privilege of refusal to answer would not exist. *United States v. Romero*, 249 F.2d 371, 375 (2d Cir.). However, the statute, § 53-295, under which the 1959 conviction was had, penalized a number of closely related acts, all basically concerned with pool selling, and as to many of these acts it provided that "each day of . . . [doing the act] shall constitute a separate offense." Even though Malloy could not again be tried on the identical charge on which he was convicted, he was entitled to assert his claim of privilege if there was a danger that his answers to the questions might furnish a "lead" to information which could be used to procure his conviction on a charge based on some other offense committed on the same day or on a charge based on the same or another offense committed on some other day, even the following day. See cases such as *Hoffman v. United States*, supra, 486; *Blau v. United States*, 340 U.S. 159, 161, 71 S. Ct. 223, 95 L. Ed. 170. Indeed, the second count of the 1959 information had charged the same type of pool selling on the day before the date charged in the first count, on which the conviction was had.

Where the state opposes a claim of privilege from self-incrimination on the ground of immunity from possible punishment—whether the immunity arises from a prior conviction, from the bar of a statute of limitations, from a pardon, or from any other cause—the state has the burden of proving the adequacy of the protection afforded by the immunity claimed. *United States v. Goodman*, 289 F.2d 256, 262 (4th Cir.), cert. granted, 368 U.S. 14, 82 S. Ct. 127, 7 L. Ed. 2d 75; 58 Am. Jur., Witnesses, § 84. A collection of cases illustrating the application of this general rule may be found in an annotation in 101 A.L.R. 389. Under the circumstances here, we prefer not to rest our decision on the ground that the state sufficiently sustained its burden of proving the adequacy of the immunity afforded by the 1959 conviction, considered alone.

There remains for consideration immunity arising from the bar of the Statute of Limitations. The maximum permissible penalty for any type of violation of the pool selling statute under which he was convicted (§ 53-295) was a fine of $500 and imprisonment of not over one year. Malloys crime in 1959 was, therefore, a misdemeanor and not a felony. General Statutes § 1-1. The applicable limitation was "one year next after the offense has been committed." § 54-193. That period had expired before Malloy's interrogation in 1961. The referee's hearing was, in fact, more than a year after the conviction of Malloy and the disposition of the criminal case on November 5, 1959. It is true that the operation of the Statute of Limitations is suspended during periods in which the person charged "fled from and resided out of this state." But Malloy made no claim that he was without the state for any period. In his habeas corpus application, and also at the hearing

before the referee, he gave his residence as Windsor, Connecticut. His 1959 arrest was in Hartford. Under these circumstances, there would be no inference that he was at any time without the confines of the state so as to toll the Statute of Limitations. If at the hearing before the referee Malloy relied on absence from the state to toll the statute, he would have had to advance that claim in order to have it considered by the court on the question of the adequacy of the immunity from punishment provided by the Statute of Limitations. Nothing of this kind was attempted. Under the facts here, we do not feel that the burden was on the state, at least in the first instance, of negating the naked possibilty that the Statute of Limitations was tolled under the exception quoted above. See *State v. Lee*, 69 Conn. 186, 199, 37 A. 75. If, and to the extent that, cases such as *People v. Rockola*, 339 Ill. 474, 477, 171 N.E. 559, would require a holding to the contrary in this particular case, we cannot follow them.

Malloy did suggest that on a felony charge—what felony charge he did not specify—the applicable limitation would be five years. See General Statutes § 54-193; *In re Pillo*, 11 N.J. 8, 21, 93 A.2d 176. As far as appears, the only criminal activity in which Malloy had ever engaged was the misdemeanor of pool selling, and this only in September, 1959. There is nothing to indicate any danger to Malloy of a prosecution for any felony. Malloy also mentioned before us, a possible prosecution for conspiracy to commit some unspecified crime, and something was made of the fact that the Statute of Limitations on a continuing conspiracy does not start to run until the last overt act is committed. *State v. Kemp*, 126 Conn. 60, 85, 9 A.2d 63. There is nothing to suggest a continuing conspiracy. Nor is

there anything to indicate any possible danger to Malloy of a prosecution for any conspiracy other than perhaps a conspiracy to violate the pool selling statute. For such a conspiracy, the limitation is but one year, since it is the same for a conspiracy to commit a misdemeanor as for the misdemeanor itself. General Statutes § 54-197. In all this, Malloy confounds vague and improbable possibilities of prosecution with reasonably appreciable ones. Under claims like his, it would always be possible to work out some finespun and improbable theory from which an outside chance of prosecution could be envisioned. Such claims are not enough to support a claim of privilege, at least where, as here, a witness suggests no rational explanation of his fears of incrimination, and the questions themselves, under all the circumstances, suggest none.

Although the claim was not made by Malloy, it is true that the state did not prove, as clearly as would have been desirable, that there was no prosecution of any sort actually instituted and outstanding against Malloy to which the Statute of Limitations would not be an effective bar. *United States v. Goodman*, 289 F.2d 256, 263 (4th Cir.), cert. granted, 368 U.S. 14, 82 S. Ct. 127, 7 L. Ed. 2d 75. That there was no such prosecution was, however, implicit in the statement of the state's attorney to Malloy that he could not be incriminated by answering the questions, and Malloy makes no claim that there was any such prosecution. Under all the circumstances, and in the absence of any hint of explanation from Malloy, we do not think that it is necessary, in this particular case, to reverse the court below because the state went no further in its evidence on this point.

The fifth amendment does not apply, as such, to state courts. *Cohen v. Hurley*, 366 U.S. 117, 118 n.1, 81 S. Ct. 954, 6 L. Ed. 2d 156. However, the fourteenth amendment, in its guarantee of due process, probably does prohibit a state court from so ruling on a claim of privilege from self-incrimination as to violate the fundamental concepts of justice and a fair trial. Ibid.; *Adamson v. California*, 332 U.S. 46, 51, 67 S. Ct. 1672, 91 L. Ed. 1903. But as already pointed out, Malloy did not, in respect to any of the questions he refused to answer, bring himself within the settled rules defining the right to assert a privilege against self-incrimination. Thus there could be no violation of due process, and there was no error in Malloy's commitment for contempt.

There is no error.

In this opinion the other judges concurred.